

Supreme Court Processing of Cases and Administrative Matters

Disclaimer

The Michigan Court Rules are and remain the governing procedures of this Court. What follows is a collection of observations that could be grouped under the heading “How Things Work at the Supreme Court.” No attempt is made herein to comprehensively analyze the Court Rules, nor have the countless steps in the management of the flood of paper that flows through the Court been detailed. This work does not include all the internal operating procedures of the Court. Rather, the goal of this work was to set forth those features of our internal procedures that might benefit the appellate practitioner. Finally, the internal procedures outlined in this document are only *general* guidelines and may be modified at any time without prior notice by a majority vote. These internal procedures create no enforceable rights in any litigant.

We hope this effort to explicate our usual internal practices will be accepted in the spirit in which it is offered and we welcome comments.

I. Applications for Leave to Appeal and Original Actions

A. *Filing*

1. *When to file*

“Filing” means the receipt by the Clerk of the pleadings. The Court has made it clear that mailing or presentation to a courier does not constitute filing under the Rules. Since 1985, the Clerk’s Office has been directed by the Court to strictly enforce the time limitations for the filing of applications for leave to appeal and motions for reconsideration. Late filings are returned and the Court does not entertain motions to extend the time for such filings. The Rules currently allow for filing applications within 56 days after decision by the Court of Appeals in criminal cases, within 42 days in civil cases and within 28 days in cases involving the termination of parental rights. Motions for reconsideration of orders must be filed within 21 days.

The Michigan Court Rules of 1985 replaced many previously established periods with periods that are multiples of seven days. The intent is that the due date for a filing will be on the same day of the week as the event that commenced the period for filing. For example, an application for leave to appeal in a civil case from a decision rendered on a Monday is due no later than the close of business on the 6th Monday thereafter. Whenever a due date falls on a legal holiday, a filing is due by the close of the next business day.

2. *What to file*

The requirements for an application for leave to appeal are set forth in MCR 7.302. The application for leave to appeal is limited to 50 pages. Original actions to invoke the supervisory jurisdiction of the Court are governed by MCR 7.304. Case law makes it clear that trial court actions or inaction in particular cases are to be brought first in the Court of Appeals whereas matters involving the administrative supervision of the courts are to be brought first in the Supreme Court (*Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559 [2002]).

An application for leave to appeal before decision of the Court of Appeals (MCR 7.302[C]) is generally disfavored and will be granted only in cases presenting questions of the highest public importance when the need for emergency action is evident. MCR 7.302(B).

Docketing of an application or original action is not complete and the matter will not be presented to the Court until the filer has provided proof of service on interested parties.

Entry fees (MCR 7.319) for an application are calculated on the basis of the number of trial court docket numbers. If more than one trial court number is involved, the Clerk will collect multiple fees. Requests for fee waiver must be accompanied by an affidavit of financial condition reflecting sources and amounts of income and liabilities and expenses.

3. *Defect correction process*

Apart from failure to file within time limitations and failure to state or argue grounds for relief, all other defects in filings are curable within a reasonable time after notice from the Clerk's Office.

Upon failure to submit a notice of hearing of a motion or application, the Clerk's Office calculates an appropriate notice date and enters that date in its records.

Violations of page number limitations are dealt with by affording an opportunity to file substitute papers or a motion to exceed the limitation.

4. *Seeking emergency or expedited consideration*

Immediate consideration of an application for leave to appeal or a motion may be sought by motion for cause shown. A motion fee of \$150 must accompany the motion. Such a motion is given to the Commissioners' Office immediately (or on the notice date of the motion) to afford the Court an opportunity to determine whether it will give expedited consideration. An appointed criminal appellate defense attorney is not required to pay a motion fee.

As in the Court of Appeals, an appeal to the Supreme Court does not, by itself, operate to stay either the Court of Appeals or trial court decision. But MCR 7.215(F) operates to prevent the effectiveness of a Court of Appeals judgment pending the disposition of an application for leave to appeal to the Supreme Court. In addition, MCR 7.302(H) provides that a stay entered by the Court of Appeals remains in effect pending disposition of an application to the Supreme Court.

5. *Response to application*

A response must be filed by the notice date for the application to ensure that it will be considered by the Court. An application for leave to appeal as cross-appellant must be filed no later than 28 days after the filing of the application.

6. *Reply in support of application*

A reply brief may be filed within 21 days, limited to 10 pages.

B. *Record on Appeal*

Because the Supreme Court obtains both trial court and Court of Appeals records on virtually all applications for leave to appeal, it is not necessary to append to an application extensive excerpts from the record below. However, relevant excerpts of the record are helpful to the Justices who are reviewing the application. MCR 2.302(H) excludes discovery materials from the record on appeal unless they were filed in the trial court under that rule. Exhibits are not always sent to the Court with the lower court record. If a party wants an exhibit reviewed, such as a photograph, the party should attach it to its application or file it with the pleading. Attempts to argue materials not in the record subject the filer to the striking of portions of offending pleadings on motion by opposing counsel or on the Court's own motion.

C. *Miscellaneous Motion Practice*

A motion ancillary to a pending application may be filed at any time. The general motion practice rule, MCR 7.313, applies. Three that raise the most procedural questions are:

Motion for dismissal of the application. This relief is generally sought by stipulation under MCR 7.310 stating the agreement of the parties that the application be dismissed with prejudice and without costs. The Court generally will not dismiss a matter without prejudice and has typically denied any motion that also requests the court to vacate the decision below. The Clerk will handle a motion requesting only the withdrawal or dismissal of an application as if it were a stipulation, waiting to see if there will be any response and then submitting the matter to the Chief Justice

for disposition.

Motion for admission pro hac vice. Confusion about this motion arises from its being brought under the Rules Concerning the State Bar of Michigan. SBR 15, § 2 provides for temporary admission on motion by a Michigan attorney who appears of record in the case. A motion for this relief should include documentation of the attorney's admission to practice and good standing in the other jurisdiction.

Motion for leave to file a brief amicus curiae. An amicus curiae brief is not only permitted at the application stage but, in practice, is encouraged. Mention of the amicus curiae brief, however, appears only in the rules relating to calendar matters, MCR 7.306(D). The Clerk's Office does not apply the limitations of that rule to amicus practice before grant of leave to appeal. Because it is never known with certainty when the Court will act on an application, amici are urged to file their motions early and submit their proposed briefs, one signed original and seven copies, with the motion.

D. *Initial Review of Applications by Commissioners' Office*

1. An application is reviewed to identify related cases, previous appeals in the same case, issues that are pending in other appeals, and cases that might require special treatment for other reasons.
2. Certain cases are assigned immediately or on the notice date on the basis of priorities established by Court Rule. MCR 7.302(C). Others are assigned on a first-in/first-out basis, though related cases generally will be assigned together. Commissioners do not specialize by subject matter, but groups of similar cases might be assigned to the same Commissioner.
3. *Commissioner Application Report Preparation*
 - a. A Commissioner works from the application and responses and from the trial court and Court of Appeals files to prepare the initial reports for Justices on each application.
 - b. Report Format. The report quotes the issues stated by the appellant, relates the facts and proceedings in the case, summarizes the arguments of the parties and the rulings of the lower courts on each issue, and recommends an order to be issued, or other action to be taken, by the Court. The Court of Appeals decision, as well as relevant lower court or tribunal opinions and other critical documents are appended. After internal review of draft reports, they are printed and distributed to the Court.

E. *Court Consideration of Applications*

1. The Commissioners' Office reports on approximately 200 applications for leave to appeal each month. The Commissioners' reports are reviewed by the Justices. The application for leave to appeal, any response, and the lower court record are also made available to the Justices. Additional reports on motions and supplemental reports (for example, after the filing of additional briefs) are also distributed.
2. Most of the reports are considered on an "Order to Enter" (OTE) basis. This means that, unless one Justice objects to the recommended order by that month's specified OTE date, the order recommended by the Commissioner automatically enters.
3. *Conference consideration*
 - a. Court conferences are generally held every Thursday, except during the weeks when oral arguments are scheduled and during the months of February and August. Conferences are generally conducted at the Hall of Justice, but may be conducted by videoconference or at an alternate location.
 - b. Of the 200 applications reviewed by the Commissioners' Office each month, roughly one-third of the applications are scheduled for conference consideration. Cases are considered at conference for one of several reasons: because at least one Justice has objected to the recommended order, because the Commissioner has recommended that the case be given direct conference consideration or because the recommendation is to grant leave to appeal or grant peremptory relief. Before conference, Justices often circulate substantive memoranda indicating their views on the cases. One of the central realities of the Court experience is the substantial number of memoranda that circulate between the Justices' offices. Considerable debate and discussion typically takes place between the Justices formally in conference and informally outside conference.
 - c. At conference, the Court decides what action should be taken on the application. The most common result is a denial of the application for leave to appeal. However, other action could be taken, including but not limited to: taking peremptory action, asking the opposing party to respond, holding the case in abeyance, requesting a further analysis by a Justice or the reporting Commissioner, placing the case on a session calendar for oral argument on the application, issuing an opinion per curiam, or considering granting leave to appeal. The Michigan

Constitution established a seven-person Supreme Court.¹ The existence of a seven-person Court anticipates that decisions by the Court are made by a majority vote. As a prudential matter, decisions to issue an opinion per curiam or to take other peremptory action require five votes. Every other action taken by the Court requires only a majority vote.

- d. Oral Argument on Applications. In December 2003, the Court first heard oral arguments on selected applications to give the Court an opportunity to further explore the issues involved without the full briefing and submission that follow a grant of leave to appeal. When the Court orders oral argument on an application, it allows the parties to file supplemental briefs and sets the time within which supplemental briefs may be filed, ordinarily 28 days. Frequently, the Court will specify particular issues of concern in an order for oral arguments on an application. The briefs are subject to the same 50-page limit as that imposed on briefs in calendar cases and parties should address any issues raised by the Court in its order, whether the Court should grant leave to appeal, and the merits of the case. Following oral argument, the Court again considers the application and makes a determination of what action should be taken.
- e. Opinions per curiam. An opinion per curiam (PC) is most often issued by the Court without oral argument by the parties. A few opinions per curiam are issued after oral argument on calendar cases. When oral argument is held on an application for leave to appeal or on calendar cases, only four votes are needed to dispose of a case by an opinion per curiam.

The initial draft of an opinion per curiam generally is written by a Commissioner under the direction of an assigned supervising Justice, although the entire opinion may be drafted by the supervising Justice.

- f. Cases considered for granting leave. Where a majority of the Justices is inclined to grant leave to appeal, the case is placed on “deferred grant” status. When a sufficient number of such cases are accumulated (typically three or four times a year), a separate conference on those cases is held to make the final determination regarding granting leave to appeal.

4. *Grant Orders*

- a. A number of grant orders merely grant leave without limiting the parties’ opportunity to address the issues raised in the application. Others specifically limit the issues to be addressed. Finally, some orders also specify issues the Court wishes the parties to address. Litigants are well

¹ Const 1963, art 6, § 2.

advised to prepare their arguments as directed in the grant order.

5. *Post-order consideration and motions*

- a. Where the action taken at conference requires further consideration by the Court (an application is held in abeyance, supplemental briefing is directed, there is a remand with the Supreme Court retaining jurisdiction, etc.), a supplemental report by the Commissioner will be prepared when the anticipated event occurs. It is processed in the same way as the original application.
- b. Motions for reconsideration or clarification
 - i. A motion for reconsideration may be filed within 21 days after the entry of the order. This time limitation is strictly enforced; the Clerk returns any motion received thereafter and the Court will not consider a motion to permit an untimely filing.
 - ii. Grounds. MCR 7.313(E) does not specify grounds for a motion for reconsideration. The same general principles that govern motions for reconsideration in trial courts apply. MCR 2.119(F)(3).
 - iii. A motion for reconsideration is assigned for initial assessment to a Commissioner other than the one who did the original report. It is processed in the same manner as an application.

F. *Processing Cases After Granting Leave to Appeal*

- 1. *Printed Briefs and Appendixes.* The grant of leave to appeal starts the time running for what were once called the “printed” briefs and appendixes of the parties (MCR 7.306 – 7.309). The most common failing by practitioners is to give inadequate attention to the preparation of the appendix. MCR 7.307 prescribes the content of the appendix. An important qualifier is the word “relevant.” Those portions of the record having a bearing on the issues before the Court are to be reproduced as completely as practicable, but there is no need to include irrelevant materials.
- 2. *Post-grant Motion Practice.* The common post-grant motions are for leave to file briefs amicus curiae and for admission pro hac vice, both discussed above, and motions for extension of time. It is necessary to file a motion for any extension of time sought. A stipulation alone will not suffice, but accompanying a motion with a stipulation will relieve the filer of the need to provide notice of the motion for hearing or proof of service on opposing counsel. The Chief Justice decides extension motions. In the summer and fall, extensions are generally granted

liberally, but in the winter and spring, when the Court is trying to get the cases submitted for decision before the end of the term, a more stringent standard may be applied.

G. *Session Calendar; Oral Argument*

1. For one week each month from October to May (except for the month of February), the Court meets in Lansing to hear arguments on the cases in which it has granted leave or directed oral argument on applications. Typically, there are three days of oral argument, usually the second Tuesday, Wednesday, and Thursday of the month.

Thirty-five days before the first day of an oral argument session, the Clerk prepares and mails the Session Calendar listing the cases to be heard and the dates of the session. The calendar gives notice of a date after which the actual schedule of the arguments will be mailed. During this period, a party may request the scheduling of a case for a particular day. The Clerk is generally able to accommodate such requests. Any request for adjournment of an argument to a later session must be made by motion.

2. In preparation for oral argument, each Justice and his or her staff will have read the parties' briefs. In addition, the Justices' staff conducts independent legal research and prepares comprehensive legal memoranda, analyzing the relevant law and the arguments made by the parties.
3. *Post-argument submissions.* It is the Court's expectation that argument and advocacy by the parties end with the oral argument and submission of the case. Any later submission of supplemental authority or argument may be presented to the Court only on the grant of a motion seeking leave for such submission. There may be requests for supplemental authority or argument from the Justices at oral argument.

H. *Opinion Preparation*

1. After oral argument, the Justices confer and discuss their preliminary views concerning how the case should be resolved. The case is assigned on a random basis to a Justice in the tentative majority. The initial draft of an opinion is circulated to the other members of the Court by a set date (usually six weeks) after oral argument.
2. Justices usually circulate memoranda, critiquing the opinion and offering substantive suggestions. Proposed opinions usually undergo many revisions in response to the suggestions of the Justices. Nonsubstantive changes, consistent with the Court's manual on style, are suggested by the Office of the Reporter of Decisions and made with the consent of the authoring Justice.

3. After an opinion is circulated to the other members of the Court, the case is placed on an opinion agenda, and considered by the Court at conference.
4. At the opinion conference, other Justices indicate whether they intend to join, concur in, or dissent from the tentative majority opinion. The initial draft of a dissenting or concurring opinion is circulated to the other members of the Court by a set date (usually three weeks) after the intent to concur or dissent is declared.
5. Each opinion remains on the opinion agenda until each Justice is satisfied with that portion of the draft opinion he or she supports, whether it be majority, concurrence, or dissent.
6. A draft syllabus for each opinion is prepared by the Office of the Reporter of Decisions and is edited and approved by the Justice authoring the opinion. MCR 7.321.
7. MCR 7.312(E) provides for reargument of calendar cases not decided by the close of the annual term on July 31. If a case has not been decided by the end of the Court's annual term, either party may file a supplemental brief. In addition, if either party requests reargument within 14 days after the beginning of the new term, the case is scheduled for resubmission.

I. *Issuance of Opinions*

Once conference consideration of an opinion has concluded with direction to the Clerk as to which Justices join in which opinions, a case is ready for release. On the release date, which is also the "Filed" date of the opinion, the Clerk mails copies to the parties and makes the opinion available for posting on the Court's website and on the Court of Appeals opinion search engine. In addition, the Court of Appeals listserv notifies its subscribers that the opinion is available.

The Reporter then prepares the opinions with syllabi and headnotes for publication in the Michigan Reports.

J. *Motions for Rehearing*

A party may seek rehearing of a case decided by opinion with a motion filed within 21 days. MCR 7.313(D). Unless the Court has directed the Clerk to issue the judgment order immediately (a direction that would be reflected in the opinion of the Court), the filing of the motion suspends the issuance of final process under MCR 7.317. That suspension continues until the Court acts on the motion or, if the motion is granted, until final disposition of the case.

The Clerk adds motions for rehearing to the opinion agenda as soon as the time for

response has expired. The Court takes up rehearings as the first item of business on the agenda. The Court will on occasion, in lieu of granting rehearing, amend its opinion or judgment by an order that is effective immediately and concludes Court consideration of the matter.

II. Supreme Court Administrative Matters

A. *What is covered?*

The Supreme Court's administrative process involves proposed amendments of rules and regulations within its jurisdiction. This includes:

1. Local and Michigan Court Rules
2. Michigan Rules of Evidence
3. Rules for the Board of Law Examiners
4. Michigan Code of Judicial Conduct
5. Michigan Rules of Professional Conduct
6. Rules Concerning the State Bar of Michigan

B. *Initiation of the Court's Administrative Process*

1. *Proposals for change.* Proposals for rule or regulation change are initiated in a variety of ways. The Court itself may decide that change is needed on the basis of issues presented in a given case. A proposal might come from an outside organization. Organizations that initiate amendment proposals include:
 - a. the State Court Administrative Office,
 - b. the State Bar of Michigan,
 - c. judicial associations,
 - d. lawyer associations,
 - e. court-appointed committees,
 - f. individual lawyers, and
 - g. any other citizen.

The proponent of the change should state the issue, describe the background regarding the suggested change, and provide a rationale and authority for the change. It is advisable to present draft language of the rule change proposed for the Court's consideration. A proponent may enlist the support of appropriate groups. The proponent of the rule change should send the request to the Clerk of the Court, P.O. Box 30052,

Lansing, MI 48909.

2. *Acknowledgment of the proposal.* The Supreme Court's Administrative Counsel is responsible for supervising and processing the administrative files. Once the Court receives a proposal for change of a rule or regulation, the Court's Administrative Counsel sends an acknowledgment to the proponent.

C. *How the Court Processes the Proposal*

1. *Administrative files.* Once the Court decides to open a file to address a particular concern, the matter is typically assigned to one of the following members of the Court's staff:
 - a. a Supreme Court Commissioner,
 - b. an employee with the State Court Administrative Office,
 - c. the Court's Legal Counsel,
 - d. the Deputy Legal Counsel, or
 - e. the Court's Administrative Counsel.
2. *Processing the assigned administrative file.* The staff person to whom the file is assigned typically drafts a report that answers three questions:
 - a. What is the issue?
 - b. Why is the matter before the Court?
 - c. What should the Justices do and why should they do it?

Reports typically consist of: (1) a summary that includes a short explanation of the proposal and its sponsor, and of the writer's recommendation and the reasons for that recommendation; (2) a background section that explains what has led to the proposal, including any relevant statutes and rules and the history of the provision the proponent seeks to change; (3) a discussion of the results of the writer's research and analysis; and (4) the writer's recommendation as to how the Court should resolve the proposal.

3. *Consideration of the proposal.* After the assigned staff member submits a report, the Justices consider that report at an administrative conference. The Court may take a number of actions including:
 - a. Publishing the proposal for comment, with or without editing

- b. Referring the proposal to a professional organization for its assessment
- c. Asking the proponent for additional information
- d. Deciding that further consideration is not appropriate

Note: Administrative reports on each administrative proposal are prepared for the Justices. Justices circulate substantive memoranda concerning the proposal before the conference. Consideration of an administrative proposal frequently consumes many conference sessions before it is published for public comment or otherwise disposed of.

4. *Notice of the proposed amendment.* The procedure for providing notice of proposed amendments is articulated in MCR 1.201.
 - a. Notice to the State Bar. The rule provides that before amending rules, the Supreme Court will notify the secretary of the State Bar of Michigan and the State Court Administrator of the proposed amendment, and the manner and date for submitting comments. MCR 1.201(A).
 - b. Notice to State Bar Sections and Committees. The State Bar secretary notifies the appropriate state bar committees or sections of the proposed amendment, and the manner and date for submitting comments. MCR 1.201(B).
 - c. Notice to Judicial Associations. The State Court Administrator notifies the presidents of the Michigan Judges Association, the Michigan District Judges Association, and the Michigan Probate and Juvenile Court Judges Association of the proposed amendment, and the manner and date for submitting comments.
 - d. Publishing the Proposed Amendment.
 - i. *Publication Order.* The Court enters an order that explains the proposed changes and includes a deadline for comments. The usual deadline is the first day of the first month that is a full three months after the date the order enters.
 - ii. *Other Publication of the Proposed Change.* Proposed amendments routinely appear in the *Michigan Lawyers Weekly* and the *Michigan Bar Journal*, and the official text is printed in the *Michigan Reports*. Proposals and comments concerning them are also posted on the Court's website, www.courts.michigan.gov/supremecourt/resources/administrative/i

ndex.htm. Those interested in addressing a proposal are invited to send their comments to the Clerk's Office, P.O. Box 30052, Lansing, MI 48909 or to the Clerk's e-mail address, MSC__Clerk@courts.mi.us.

- e. Exceptions to Publishing Proposals for Comment. The Court may modify or dispense with the notice requirements if it determines that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice. MCR 1.201(D).

Typically the Court receives an updated staff report summarizing the comments submitted.

5. *Administrative public hearing*

The Court conducts a public hearing pursuant to Administrative Order 1997-11 before acting on a proposed amendment that requires notice, unless there is a need for immediate action, in which event the amendment is considered at a public hearing following adoption. Hearing agendas are contained in a Notice of Public Administrative Hearing, which is posted on the Court's website. MCR 1.201(E).

At the hearing, as detailed in the Notice of Public Administrative Hearing, interested persons have an opportunity to comment briefly on a proposal. A proposal is generally not considered at a public hearing until the comment period has expired. However, there are circumstances in which a proposal will be on a hearing agenda before the comment deadline, or after it has been adopted by the Court.

6. *Procedure following the public hearing*

After the hearing, the Court reconsiders the matter along with comments and any new staff report that summarizes the comments submitted. The Court may take any number of actions, including:

- a. Adopting the proposal as published for comment
- b. Adopting a modified version of the proposal
- c. Declining to adopt the proposal

- 7. *Publication of Order.* If the Court issues an order adopting the proposal, it will be printed in the publications mentioned earlier and posted on the Court's website.

D. *Effective Date of Amendments*

Unless there is a need for immediate action, rule amendments will take effect on one of

the following dates:

1. January 1,
2. May 1, or
3. September 1.

E. *Final Notification to Proponent*

No matter what action the Court takes, the proponent will be notified and provided with a copy of any order the Court enters.

F. *Other Court Administrative Matters*

As part of the administrative process, Justices:

1. select Chief Judges of lower courts,
2. approve local rules, and
3. exercise general supervisory authority over local courts.